

APPEAL NO. 032331
FILED OCTOBER 22, 2003

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on August 1, 2003. With respect to the issues before him, the hearing officer determined that the appellant (claimant) did not sustain a compensable injury on _____; that he did not timely report his alleged injury to his employer, without good cause for his failure to do so; and that the claimant did not have disability because he did not sustain a compensable injury. In his appeal, the claimant argues that the hearing officer erred in failing to add the issue of whether the respondent (carrier) waived its right to contest compensability under Continental Cas. Co. v. Downs, 81 S.W.3d 803 (Tex. 2002). In the alternative, the claimant contends that the hearing officer's injury, notice, and disability determinations are against the great weight of the evidence. The appeal file does not contain a response to the claimant's appeal from the carrier.

DECISION

Reversed and remanded.

The claimant argues that the hearing officer erred in refusing to add the issue of whether the carrier had waived its right to contest compensability under Downs, *supra*. The claimant timely filed a response to the benefit review conference (BRC) report stating that the carrier waiver issue had been discussed at the BRC but that the benefit review officer failed to certify that issue for resolution at the hearing. In its reply to the claimant's response to the BRC report, the carrier acknowledged that the issue had been discussed at the BRC. Thus, it is undisputed that the Downs waiver issue was discussed at the BRC. As a result, the hearing officer erred in not adding the issue. Texas Workers' Compensation Commission Appeal No. 002210, decided November 10, 2000; Texas Workers' Compensation Commission Appeal No. 981770, decided September 21, 1998; and Texas Workers' Compensation Commission Appeal No. 980683, decided May 21, 1998. Accordingly, we reverse and remand for the hearing officer to consider and resolve the carrier waiver issue. Because the resolution of the carrier waiver issue may also effect the hearing officer's determinations that the claimant did not sustain a compensable injury and that he did not timely report his injury to his employer, we reverse and remand those determinations as well. The carrier did not appeal the factual determination that because of the claimant's left shoulder rotator cuff tear, he has been unable to obtain and retain employment at his preinjury wages from January 28 to July 10, 2003, and that factual determination has become final. Section 410.169. However, the ultimate conclusion of whether the claimant had disability is dependent upon the resolution of the waiver issue and more specifically, on the determination of whether the claimant sustained a compensable injury as a matter of law; thus, we likewise remand the disability determination.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Texas Workers' Compensation Commission's Division of Hearings, pursuant to Section 410.202 which was amended June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code in the computation of the 15-day appeal and response periods. See Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

The true corporate name of the insurance carrier is **CONTINENTAL CASUALTY COMPANY** and the name and address of its registered agent for service of process is

**CT CORPORATION
350 NORTH ST. PAUL
DALLAS, TEXAS 75201.**

Elaine M. Chaney
Appeals Judge

CONCUR:

Chris Cowan
Appeals Judge

Gary L. Kilgore
Appeals Judge